Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Rulemaking to Amend Parts 1, 2, 21, and 25 of the Commission's Rules to Redesignate the 27.5-29.5 GHz Frequency Band, to Reallocate the 29.5-30.0 GHz Frequency Band, to Establish Rules and Policies for Local Multipoint Distribution Service and for Fixed Satellite Services	)	CC Docket. No. 92-297

MCI COMMENTS

MCI Telecommunications Corporation (MCI), by its attorneys, hereby submits these comments on eligibility rules for Local Multipoint Distribution Service (LMDS) in response to the Fourth Notice of Proposed Rulemaking (Fourth NPRM) in the above-captioned proceeding.[1]

INTRODUCTION

The Commission's Fourth NPRM raises an issue in which MCI, as a new entrant in the local exchange telecommunications marketplace, has a direct and potentially substantial interest. MCI fully supports the Commission's conclusion that "LMDS is uniquely positioned to provide competitive telecommunications services and video programming delivery because of its large potential for two-way broadband capabilities."[2] Particularly in light of the important goal under the Telecommunications Act of 1996 of facilitating the development of effective, facilities-based competition for local telephone services and video programming delivery, MCI submits that

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[1] *Rulemaking to Amend Parts 1, 2, 21, and 25 of the Commission's Rules to Redesignate the 27.5-29.5 GHz Frequency Band, to Reallocate the 29.5-30.0 GHz Frequency Band, to Establish Rules and Policies for Local Multipoint Distribution Service and for Fixed Satellite Services*, First Report and Order and Fourth Notice of Proposed Rulemaking, ¶¶ 105-36, CC Docket No. 92-297 (released July 22, 1996).

[2] Fourth NPRM ¶ 125.

eligibility restrictions barring incumbent local exchange carriers (LECs) and cable television multiple system operators (MSOs) from bidding on LMDS spectrum in any license area which overlaps their monopoly service areas are essential to promoting competitive alternatives and, therefore, manifestly in the public interest.

DISCUSSION

The Fourth NPRM asks for comment on a wide variety of technical, economic and policy questions related to whether incumbent LECs and MSOs should be permitted to participate in LMDS auctions for license areas, *i.e.*, BTAs, in which they provide service. Having urged the Commission to take this step,[3] MCI is pleased that the Fourth NPRM recognizes both the potentially significant deconcentrating effect of LMDS and the anticompetitive risk arising from unrestricted LEC and MSO participation in this unique new wireless service. At the same time, MCI is concerned that the Fourth NPRM's request for additional comment on these questions --- which were sought as well in the *Third Notice* in 1995 -- will unnecessarily delay licensing of LMDS providers and offer an opportunity for incumbent providers to "straightjacket" potential entrants through procedural diversions.

There is no more important task facing the Commission today than setting the ground rules for the rapid and proconsumer development of competition for local telecommunications. As the Commission's recent decision on interconnection and unbundling under Section 251 of the 1996 Act recognizes, removal of entry barriers to local telephone competition is just the start of a lengthy process which will eventually lead to ubiquitous, facilities-based competitive entry. Given the substantial capital expenditures required for construction of local telephone networks,

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[3] *See* Letter from Donald F. Evans, Vice President, MCI, to Reed E. Hundt, Chairman, FCC, CC Docket No. 92-297, May 24, 1996.

competitive LECs will in many instances purchase unbundled network elements, or resell incumbent LEC services, as a means of entering the market. Thus, in order to implement the Act's objective of fostering the growth of competitive alternatives for local telephone consumers, the Commission must enhance the immediate introduction of other cost-effective facilities-based entrants into the local marketplace, wherever possible.

LMDS is just such an option for fast, relatively inexpensive new entry into *both* local exchange telephony and video programming distribution. The service offers the potential to be a robust competitor to incumbent LECs and MSOs well before other facilities-based competitive LECs can hope to complete construction of their own wireline networks. As a broadband wireless service, moreover, *LMDS has no efficiencies or economies of scope in common with wireline telephone or cable television service.* Indeed, allowing incumbent LECs and MSOs to bid for LMDS spectrum would block new entrants and provide a disincentive for these monopolists to develop their existing networks to offer broadband capabilities, thereby harming the public interest.

MCI therefore urges the Commission to impose eligibility restrictions on incumbent LECs and MSOs, barring them from bidding on, holding an attributable interest in, or engaging in the post-auction acquisition of LMDS licensees within their existing service areas. This rule is especially important for interexchange carriers (IXCs), for whom unbundling and interconnection are unlikely to present substantial access alternatives to LECs in the near term. The Commission's August 1 decision in the interconnection proceeding -- applying access charges to unbundled LEC network elements -- makes other access methods vital. IXCs have long been captive access customers of incumbent LECs. The Commission should accordingly take every step necessary to prevent incumbents from locking up new access alternatives and maintaining their "captivity" of IXCs. Eligibility rules must be a key component of this policy.

1. Auction Policy Considerations. The Fourth NPRM notes that the Commission has sought to avoid interfering in competitive markets with unnecessary regulation, and asks for comment on how to balance "the potential for competition presented by open entry against the possibility that this spectrum may be used to forestall rather than promote competition." Fourth NPRM ¶ 125. MCI agrees with the Commission that competition is preferable to regulation. We believe that LMDS eligibility limitations would represent a classic example, however, of the use of regulation to control the anticompetitive exercise of market power. Incumbent LECs and MSOs have monopoly power, and thus have a plain economic incentive to delay or exclude entry and competition. Just as the 1996 Act's interconnection provisions for incumbent LECs are designed to use regulation as a means of checking market power and eliminating barriers to competition, so too would eligibility limitations be a means of preventing abuse of incumbent monopoly power until meaningful competition develops.

2. LMDS Potential. LMDS in fact is a "unique and necessary resource for de-concentrating the market power of incumbent LECs and cable operators." Fourth NPRM ¶ 126. First, as a technical and economic matter, LMDS can support the simultaneous broadband provision of telephone service, video programming and data services such as Internet access.[4] LMDS "will deliver hundreds of digital video channels together with telephone and data services."[5] This makes it far more robust and less expensive than terrestrial "mobile" wireless services such as

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[4] *See* "Independence Day of the Telecom Industry," Remarks of FCC Commissioner Rachelle B. Chong at Telestrategies Wireless Broadband Conference, Washington, D.C., July 16, 1996, at 3 ("I'm excited about the LMDS vision of offering its customers a rich package of services, things like telephone service, broadcast and interactive video, video teleconferencing, high-speed, two-way data transmission and Internet access. It's going to be an attractive offering, no doubt about it.")

[5] Wireless Week, June 17, 1996 (quoting Chairman Hundt). Assuming an average urban density, an all-digital LMDS transmitter can deliver data and telecom lines to serve 15,000-18,000 customers while supporting 224 digital video channels across 1 GHz of spectrum, *Id.* (quoting Thomas Kilge of Texas Instruments).

cellular and PCS, which require much larger capital investment to support "hand off" and roaming, and far more "local" than satellite-delivered services, which must be configured to cover a far larger geographic "footprint." Second, LMDS is a flexible service because the spectrum used can be divided quickly and easily among different services -- for instance, switched telephony and video -- thus making it highly responsive to customer demand. Finally, LMDS is technically superior to the spectrum-based services that will be auctioned later, such as 40 GHz, because, as CellularVision has previously shown, there are significant signal propagation differences, and resulting increased technology expenses, associated with other higher-frequency wireless spectrum blocks. Fourth NPRM ¶ 29.

3. Efficiencies or Potential Incumbent "Advantages." The Commission has asked for comment on whether there are any "inherent" cost advantages of efficiencies possessed by incumbent LECs or MSOs in providing "in-region" LMDS. *Id.* ¶ *127.* The answer simply is no. As the Fourth Notice recognizes (*id.* ¶ 112-13), none of the LEC or cable commenters in this proceeding has raised any efficiency arguments against an eligibility restriction, let alone proven that there are economies of scope between "wired" telephone or cable services and LMDS. In fact, because LMDS is a wireless service that will not share infrastructure with existing LEC and MSO networks, there is no economic basis for the achievement of any appreciable efficiencies or economies of scope from the joint provision of wired telephony or video services and LMDS.

The Fourth NPRM questions whether, in some way, the "size, experience and financial status" of RBOCs or MSOs would make them "uniquely positioned to be strong LMDS providers" (*id.* ¶ 128). The answer, again, is no, for incumbents have no more experience with either LMDS or broadband wireless services in general than other potential providers, and the size of potential entrants is irrelevant to the success of their entry. More generally, whatever advantages the RBOCs do have as providers of wireline local exchange services have been shown not to extend to other contexts. For instance, RBOCs have been claiming since 1984 that repeal of the MFJ's information services ban would allow them to compete vigorously in the enhanced services marketplace, but despite the elimination of that prohibition by the courts in 1990, RBOCs have yet to successfully launch any significant on-line or other information services.

Finally, LECs and cable operators have also been professing the imminent deployment of complementary technologies (such as ADSL and cable modems/telephony, respectively) that will permit them to use their networks to compete with each other immediately. As a policy matter, MCI strongly believes that the Commission should force these incumbents to make good on their promises -- which provided a major reason for congressional elimination of the telco-cable cross-ownership provision -- before allowing them to acquire additional wireless spectrum for those purposes. If the choice is between a duopoly (LEC v. cable) market structure or a more vibrant, multi-competitor marketplace, the public interest demands that the FCC choose the latter.

4. *Warehousing Incentives.* The Fourth Notice inquires whether LECs and MSOs would have an economic incentive to acquire LMDS spectrum "to supplement their existing services rather than face immediate competition." *Id.* ¶ 129. As MCI advised the Commission previously, it is clear that incumbents would have just such an anticompetitive incentive because they value the spectrum more highly than others because of the "opportunity costs" of lost monopoly profits and market share. Any "supplemental" markets (and potential profits), such as video-conferencing, are dwarfed by the tremendous monopoly profit streams that would be at risk from real, facilities-based competition. Indeed, as the Commission observed in its recent PCS Order:

> Economic theory teaches that auctions are won by the bidder who puts the highest value on the property being auctioned. The value of the PCS licenses to the incumbent providers would be their continued economic rents (profits in excess of

> economic costs), which could be higher than the anticipated profits of new entrants into a more competitive market. Incumbent firms may thus be willing to pay even more for the chance to impede entry than for the chance to compete vigorously against new entrants.[6]

These same considerations are equally applicable to LMDS.[7]

5. Structuring Eligibility Restrictions. Paragraph 131 of the Fourth NPRM seeks comments on whether the Commission should structure eligibility restrictions or use the alternative of directing uses of LMDS, by incumbents, in order to assure that "competitive" applications develop. MCI does not believe that restrictions on the use of spectrum are an efficient means of regulating against the exercise of market power. Not only would they be intrusive to business operations and both costly and difficult to enforce, but usage limitations quite clearly run up against the Commission's emerging policy of permitting flexible use of spectrum by licensees. The better approach is to ban incumbents from participating in LMDS services *until their market power has been checked by the emergence of effective competition.* In this way, incumbents and new entrants will be treated exactly alike -- *any* party with a facilities-based monopoly will be barred from acquiring an LMDS license, and all parties that do not have market power will be free to compete with the spectrum in whatever way consumers in the marketplace demand.

The "advantages" of a narrow restriction are illusory. The experience of competition in wireless communications shows that incumbents will use their economic power, and monopoly rents, to impede and acquire potentially competitive technologies. RBOCs and LECs have over

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6 *Amendment of Parts 20 and 24 of the Commission's Rules -- Broadband PCS Competitive Bidding and the Commercial Mobile Radio Service Spectrum Cap*, WT Docket No. 96-59, FCC 96-278, ¶ 99 (released June 24, 1996).

7 "Build out" requirements do not alleviate the warehousing incentive (Fourth NPRM ¶ 130), because they can dictate only when a network is constructed, not how it is to be used. Incumbents can just as easily warehouse LMDS spectrum by restricting its use to "complementary," non-competitive services as by holding the asset without developing any commercial services.

the past decade acquired virtually all of the "non-wireline" cellular mobile radio licenses, in turn ensuring that cellular services have been marketed only as a complement to local exchange services, not a directly competitive substitute. MSOs have used vertical integration to deny programming access to wireless competitors such as MMDS, in order to maintain local cable system market power. The lesson is that if a monopoly incumbent is permitted to enter even part of a competitive service, the technology will be stifled, over-priced, and never developed as a full-fledged threat to the incumbent's "core" monopoly services.

6. *Definitions and Attribution.* MCI agrees with the Fourth NPRM's suggestions to use the cellular/PCS "20%" rule to define an "in-region" BTA where LEC and MSO service areas differ from LMDS license areas (*id.* ¶ 132). We believe the same rule should apply to both LECs and cable operators, particularly in light of the smaller size of cable franchises relative to BTAs. We also agree that the 10% attribution standard, under which an incumbent interest of 10% or more would be attributable, is a reasonable approach. *Id.* ¶ 133.

7. *Expiration of Eligibility Restrictions.* The Commission concludes its examination of LMDS eligibility restrictions by inquiring whether the competitive checklist of Section 271 of the 1996 Act for RBOCs, or the effective competition test of Section 623 of the Act for cable operators, are appropriate standards to use for a "sunset" of any restrictions. Fourth NPRM ¶ 135. MCI strongly agrees with the Notice's indication that satisfaction of the checklist and other statutory criteria for RBOC entry into long-distance services is not "a reliable indicator of the appropriate level of local exchange competition" for purposes of LMDS eligibility restrictions. While the Commission has not yet addressed the question of what specific market-opening steps are required for satisfaction of Section 271, it is clear that the facilities-based competitor and competitive checklist requirements of Sections 271(c)(1)(A) and 271(c)(2) are not the economic

or policy equivalent of effective local exchange competition; the 1996 Act also conditions RBOC entry into long distance on an affirmative Commission finding that such entry would serve the public interest, and requires the RBOCs to satisfy elaborate separate subsidiary safeguards. Accordingly, just as the Commission did in the cellular/PCS Order, it should apply ordinary market competition tests, such as HHI or other market share indices, to determine whether the local marketplace has been sufficiently deconcentrated to allow incumbent acquisition of directly competing facilities-based competition such as LMDS.

CONCLUSION

For all the foregoing reasons, eligibility restrictions barring LECs and cable operators from bidding for, or acquiring, LMDS licensees within their service areas should be imposed until these incumbents face effective competition for their core monopoly services. These restrictions clearly serve the public interest by maximizing competitive opportunities in connection with the introduction of effective facilities-based competition for local telephone and video programming services.

Respectfully submitted,
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